DATE: June 6, 1994

CASE NO.: 94-TLC-13

In the Matter of:

W.A. MALTSBERGER, d.b.a. MALTSBERGER RANCH

Employer

Appearances:

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For Employer

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For the Certifying Officer

Before David A. Clarke, Jr.
Administrative Law Judge

DECISION AND ORDER

This case arises under the Immigration and Nationality Act (hereinafter "INA"), 8 U.S.C. §§ 1101(a) (15) (H) (ii)(a), 1184, 1188; 29 U.S.C. §§ 49 through 49*l*-1, and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subpart B. This is an expedited administrative-judicial review of the decision of the U.S. Department of Labor (hereinafter "DOL") Regional Administrator of the Employment and Training Administration to deny the application for temporary agricultural labor certification of W.A. Maltsberger, owner of the Maltsberger Ranch.

PROCEDURAL HISTORY

On March 18, 1994, Mr. Maltsberger submitted, by facsimile, an application to the DOL for alien employment certification for fourteen Cattle Ranch Workers to work on the Maltsberger

Ranch for the period covering August 1, 1994, to July 16, 1995. (CF at 63-64.)[1] Mr. Maltsberger supplemented his application with additional information on March 23, 1994. (CF at 31-58.) On March 25, 1994, Charlene G. Giles, the Certifying Officer (hereinafter "CO"), returned Mr. Maltsberger's application without processing and recommended that he request special procedures from the Director of the United States Employment Service, 20 C.F.R. § 655.93(b). (CF at 28-30.) On March 29, 1994, Mr. Maltsberger resubmitted his application to the Certifying Officer without having requested special procedures. (CF at 4-27.) The CO denied Mr. Maltsberger's application on April 7, 1994.

On April 11, 1994, Mr. Maltsberger requested administrative review of the denial of labor certification, 20 C.F.R. § 655.112(a) (1). (CF at Al-A7.) The parties waived the five-day-period, § 655.112(a) (2). On April 21, 1994, Mr. Maltsberger submitted his brief along with a copy of *Beef* magazine containing an article on the Maltsberger Ranch, a videocassette tape and photo journal providing an overview of the work and activities performed on the Maltsberger Ranch, a program titled "Ranch Tour & Field Day", and ledger sheets containing an "H-2A Temporary Agricultural Alien Labor Work Summary" for September 1, 1993, through March 31, 1994 (hereinafter "H-2A Work Summary").[2] The Texas Ranchers' Labor Association submitted a brief, *amicus curiae*, on April 28, 1994, supporting Mr. Maltsberger's position. On May 18, 1994, the DOL Office of the Solicitor submitted a response, "Memorandum in Support of Certifying Officer's Non-Acceptance of Application for Temporary Alien Agricultural Labor Certification." Mr. Maltsberger submitted a reply on May 23, 1994.

STATEMENT OF THE CASE

The Maltsberger Ranch is a 15,000-acre livestock ranch located on the Rio Grande Plains of south Texas, midway between San Antonio and Laredo. (Paul D. Andre, *A Prickly Way To Beat the Ravages of Drouth*, 27 Beef 30-31 (1991).) The ranch has been operated by the Maltsberger family since 1885. (Videocassette. *See* Andre, *supra* at 31.) The ranch climate is semiarid and land use is based on natural vegetation. (Ranch Tour at 5.)

Prior to this case, Mr. Maltsberger applied for and received certification for temporary agricultural alien laborers, to work as cattle ranchers from October 20, 1991, to October 19, 1992, (CF at 1; Emp. Br. at 3), October 5, 1992, to September 21,.1993, (CF at 1; Emp. Br. at 4), and September 1, 1993, to August 15, 1994, (CF at 1; Emp. Br. at 5). The dates covered by these certifications overlapped, (*see* CF at 1; Emp. Br. at 2), and the cumulative effect of the three certifications was to provide a cadre of on-call workers for emergency feeding situations, (Photo Journal at 2O), covering the period from October 26, 1991, to August 15, 1994. Mr. Maltsberger

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[1] "CF" refers to the certified copy of the Employment and Training Administration case file. 20 C.F.R. § 655.112(a) (1).

[2] Under the regulations, "(H) an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States (a) to perform agricultural labor or services . . . of a temporary or seasonal nature," 8 U.S.C. § 1101(a) (15) (H) (ii) (a), is sometimes referred to as an "H-2A" worker. ... .

stated that the overlapping dates were necessary to provide time to work out unexpected delays in the labor certification process, including petitioning the U.S. Immigration and Naturalization Service for visas. (Emp. Br. at 2.)

Mr. Maltsberger pays H-2A ranch workers $669 per month, prorated by the number of days the worker is available for work at the job site, (CF at 32. *See* CF at 66), and he provides them with free room and board. (CF at 65-66.) Mr. Maltsberger requires that the ranch workers be on-call twenty-four hours a day, seven days a week, including holidays.[3] (CF at 66.) To comply with the regulations at 20 C.F.R. § 655.102(b)(6), Mr. Maltsberger must guarantee to offer work to each H-2A worker for at least three quarters of the total number of workdays of the. work contract. (CF at 66; Photo Journal at 11.)

The typical workday at the Maltsberger Ranch starts before daylight, with work orders being given and discussed over coffee. (Photo Journal at 4.) The workers primarily feed, graze, care for and protect the livestock. (*See* CF at 66.) They work on the range, in the pasture, or in pens, often on horseback and sometimes on foot, as conditions require. (Photo Journal at 9.) They typically take a siesta at noon, and in hot weather may not return to work until the cooler part of the evening and then work until dark. (Photo Journal at 4.)

The Maltsberger Ranch vacillates between times of abundance and drought. Following fall, winter, and summer rains, the pastures of the Maltsberger Ranch contain an abundant supply of grass. (Photo Journal at 14.) When conditions are ideal for cattle there is little demand on the ranch workers' time. (Photo Journal at 12-13.) However, a dry fall or poor spring rains cause range conditions to deteriorate rapidly. (Photo Journal at 15.) In Mr. Maltsberger's words,

> "Range fire, insects, drought, hail, freezing weather, or unusually wet winters can all cause need for unforeseen and temporary emergency feeding of our livestock. Feeding must start immediately to keep livestock from starving. We can not wait when such needs occur. To delay – means economic ruin. Because of the extreme vagrancies of our climate we know these conditions are going to occur. But when they will happen and how long they will last, nobody knows.

(CF at 35.) For this reason, Mr. Maltsberger maintains that he must have a cadre of on-call temporary workers to help in emergency feeding situations. (Photo Journal at 20.)

To prepare and feed prickly pear cactus to the cattle during seasons of drought, the workers first cut the cactus and haul it to a central location. (Photo Journal at 15-16, 21.) Then,

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[3] In the brief on behalf of the Certifying Officer, the Solicitor argued that "[a]ny U.S. worker, in seeking employment, would read this job description and believe that the job consisted of full-time work [for] . . . nearly a year." (SOL Br. at 6.) This argument goes to the issue of whether there are U.S. workers interested in the job opportunity and should be addressed during the recruitment phase, at which time Mr. Maltsberger should correct the "material terms and conditions" of the job notice to the extent necessary to make it clear that the job opportunity is for intermittent work during the contract period. 20 C.F,R. § 655.100(a) (1).

using a propane torch they burn the thorns off the cactus, run the cactus through a forage cutter, and shovel the end-product into feed troughs. (Photo Journal at 22-23.) In addition to their feeding duties, the workers gather livestock, scatter bulls, maintain fences and water facilities, sort and ship livestock, and assist with calving, castrating, branding, ear marking, and vaccinating livestock. (Photo Journal at 10; CF at 35.) The workers also assist in training colts. (Photo Journal at 8; CF at 35.) Further, the workers make and repair bridles, headstalls, bosals, reins, quirts, leggings, and saddles. (Photo Journal at 6.)

As a result of his most recent certification, Mr. Maltsberger employed twelve H-2A workers between September 1, 1993, and March 31, 1994. During those seven-months, ten of the twelve workers had at least one month working fewer than fifteen days, with seven workers having one or more months consisting of seven or less work days. (H-2A Work Summary.) Further, ten of the workers had at least eighteen days off in a row during the seven-month period. (H-2A Work Summary.) In addition, of his cadre of twelve H-2A workers, Mr. Maltsberger employed on average ' six to nine workers each month. (H-2A Work Summary.) In his March 17, 1994 letter to the CO, Mr. Maltsberger explained, "[t]hese worker reside in Mexico and have no intentions of abandoning such residence . . . . They will work from five to eight weeks at a time and return to Mexico to be with their.'. I . families from two weeks up to a month or more, depending upon their domestic needs." (CF at 59.) Thus, while under contract for the greater part of the year, the H-2A workers actually work for Mr. Maltsberger on an intermittent basis, rotating coverage and receiving more time off than would be typical for most permanent employment in the United States.

This case arose when Mr. Maltsberger sought review of the Certifying Officer's denial of his fourth application for certification, covering the period from August 1, 1994, to July 16, 1995. (CF at 63-64.) The Certifying Officer denied Mr. Maltsberger's application, which overlapped with his previous certification, on the basis that it appeared Mr. Maltsberger was attempting to use the temporary certification process to obtain permanent labor certification, based on the "cumulative effect of [the] overlapping dates of need' and because Mr. Maltsberger appeared to be seeking certification for a "series of temporary jobs." (CF at 1.) The Certifying Officer stated that Mr. Maltsberger appeared to be seeking exceptions to the "normal" temporary certification process, that she did not have the authority to grant exceptions, and that therefore Mr. Maltsberger must seek approval from the Director of the Employment Service. (CF at l-2.)

DISCUSSION

Upon application of an employer desiring to employ nonimmigrant foreign workers in the U.S., the Secretary of Labor must determine (1) whether U.S. workers are available to perform the temporary and seasonal agricultural employment sought by the employer and (2) whether employing H-2A workers will adversely affect the wages or working conditions of similarly employed U.S. workers.[4] 20 C.F.R. § 655.90(a). Employment on a ranch connected with raising,

[4] Under the regulations, the determination of whether to accept an application for consideration and whether to certify temporary alien agricultural labor is made by the Regional (continued...)

feeding, caring for, training, and managing livestock is "agricultural labor." *See* 20 C.F.R. § 655.100(c) (i) (l), (5). The question in this case is whether the cattle ranch work for which Mr. Maltsberger seeks certification is "temporary and seasonal."

Last year, Mr. Maltsberger applied for administrative review of the CO's decision not to accept his application for temporary agricultural labor certification. *W.A. Maltsberger, d.b.a. Maltsberger Ranch*, 93-TLC-6 (July 2, 1993) (hereinafter "*Maltsberger I*"). The decision in that case turned upon whether the H-2A cattle ranch workers sought by Mr. Maltsberger were temporary or seasonal. (*Maltsberger* I at 4.) Based on the certified case file and the written submissions of the parties and *amicus curiae* in that case, the undersigned found that "the Maltsberger cattle ranch job opportunities are for agricultural se-ices or labor of a temporary or seasonal nature, within the meaning of the statute." (*Maltsberger* I at 7.) The evidence and argument presented herein do not change that determination.

The regulations require that the labor certification process be construed to effectuate the purpose of the INA in that U.S. workers, rather than aliens, should be employed wherever possible. 20 C.F.R. § 655.90(d) citing *Elton Orchards, Inc. v. Brennan*, 508 F.2d 428, 500 (1st Cir. 1974); *Flecha v. Quiros*, 567 F.2d 1154, 1156 (1st Cir. 1977). Beginning with Mr. Maltsberger's first temporary certification application in 1991, neither DOL nor the Texas Employment Commission has found a single qualified U.S. worker willing and able to work on the Maltsberger Ranch, despite compliance with the required recruiting requirements in each of the three previous certifications.[5] (Emp. Br. at 6.) Therefore, since there are no U.S. workers interested in working on the Maltsberger Ranch, Mr. Maltsberger's use of H-2A workers does not displace U.S. workers.

The record shows that the H-2A workers primarily feed and care for cattle during periods of drought. Further, during non-ranch drought times the workers who remain on the ranch perform other duties, such as training horses and mending fences and equipment. The regulations provide that

> [l]abor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a

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[4](...continued)
Administrator, who in turn may delegate this responsibility to a staff member. 20 C.F.R. § 655.92. Thus, in the case *sub judice*, the Certifying Officer made the decision to deny Mr. Maltsberger's application.

[5] Moreover, the Certifying Officer has found for each of the three previous certifications that the employment of H-2A workers by Mr. Maltsberger would not adversely affect the wages or working conditions of similarly employed U.S. workers, which shows that the wage offered is the prevailing wage for the job in that region.

> seasonal basis *even though he may continue to be employed during a major portion of the year*.

§ 655.100(c) (2) (emphasis added). The record indicates that Mr. Maltsberger's cattle ranch workers work on an intermittent basis, often taking weeks off from work. Such absences are not consistent with typical permanent full-time employment. Therefore, while needed year after year, the workers are employed during a major portion, but not all, of the year. Further, since Mr. Maltsberger uses the workers to prepare cactus and feed it to the cattle during periods of drought, and since a season is "[o]ne of the two divisions of the year, rainy and dry," in certain climates, *Webster's II New Riverside University Dictionary*, at 1053 (19881, the cattle ranch labor performed on the Maltsberger Ranch is seasonal. Thus, while Mr. Maltsberger's application for H-2A workers may not be "normal," (CF at 1; SOL Br. at 11, his job opportunity does not circumvent the regulations, which permit H-2A workers to be employed on a . seasonal basis during a major portion of the year.

In the brief on behalf of the Certifying Officer, the Solicitor argued that although the job duties may vary by season, Mr. Maltsberger's 'need" is permanent. (SOL Br. at 3.) "It is not the nature of the duties, but the employer's professed need which determines which labor certification procedure, temporary or permanent, is appropriate." (*Id*. at 4.) Thus, the Solicitor asserted that because Mr. "Maltsberger wishes to have available a work force the entire year, year after year," he should file for permanent labor certification. (SOL Br. at 4.)

The Solicitor was asked to explain how the Certifying Officer's position in this case reconciles with her position in *Vito Volpe Landscaping*, 91-INA-300, which is pending before the *en banc* panel of the Board of Alien Labor Certification Appeals. In that case the Solicitor argued that

> the determination of whether a job opportunity qualifies for certification under either the permanent or temporary labor certification programs turns solely on the nature of the job opportunity. If the job duties can only be performed during certain periods of the year, it can only qualify for labor certification under the temporary program.

(SOL Br. 91-INA- at 16 (Aug. 2, 19931.) In the case *sub judice*, the Solicitor stated that the Certifying Officer's position in the two cases is consistent, because in *Vito Volpe* the work was "seasonal in that the workers were employed during the spring, summer and fall, and not the winter," making the job opportunity seasonal and not permanent, whereas Mr. Maltsberger's application identified "a continued need for nearly four years which will continue indefinitely," making the job opportunity permanent. (SOL Br. at 10.)

The Solicitor's explanation for these two cases is not., convincing, since it addresses the outcome of the Certifying Officer's decisions but does not reconcile the conflicting reasoning the Certifying Officer used to reach those decisions. In Mr. Maltsberger's case, for example, the Certifying Officer based her decision on the employer's "need," finding that a continuous need, year after year, requires a permanent certification, regardless of the nature of the duties, whereas

in *Vito Volpe* the Certifying Officer based her decision on the "nature of the job opportunity,' finding that because the job opportunities could only be performed during certain periods of the year, the employer could only qualify for the temporary certification program, regardless of the need for workers year after year.

The contradiction in the Certifying Officer's reasoning in the two cases is perhaps explained by the difference between "seasonal" and "temporary." Determinations of temporary employment focus on "need," (Memorandum for Alan C. Nelson, Commissioner, Immigration and Naturalization Service, at 4 (Apr. . 23, 1987)), whereas determinations of seasonal employment focus on the nature of the job opportunity. In the case *sub judice*, the Certifying Officer must look at the seasonal nature of the job opportunity, which requires examining the nature of the job. Since the workers are primarily needed during the dry seasons, and since the workers rotate coverage and receive more time off than would be typical for most permanent employment in the U.S., the nature of the job shows. that Mr. Maltsberger's H-2A workers . are seasonal, and the duration of his need is not dispositive.

The Solicitor also argued that by approving Mr. Maltsberger's application last year, a new program was created, usurping the exclusive authority of the Director of the U.S. Employment Service to create exceptions to the temporary labor certification process. (SOL Br. at 5 n. 1.) The regulations provide that the Regional Administrator shall not grant certification "where the job opportunity has been or would be filled by an H-2A worker for a cumulative period, including temporary alien agricultural labor certifications and extensions, of 12 months or more, *except in extraordinary circumstances*." 20 C.F.R. § 655.101(g) (emphasis added). Thus, for applications describing a job opportunity of twelve months or more, rather than prohibiting certification by the Regional Administrator or relegating certification to the Director, the regulations merely require a finding of extraordinary circumstances. Therefore, by approving Mr. Maltsberger's application last year, an extraordinary circumstance was found, which was not inconsistent with the regulations.

Furthermore, as the legislative history to recent amendments of the INA shows, Congress intended for such use of the temporary work program. When considering the Immigration Reform and Control Act of 1986, P.L. No. 99-603, 100 Stat. 3359, the House Judiciary Committee noted that

> [t]he H-2A program, in one form or another, has been an element of U.S. immigration policy since the 1940's. The essential objective of the program, which the bill does not change, is to permit employers to utilize temporary foreign worker[s] if domestic workers cannot be found and if it can be shown that the use of such foreign labor would not adversely affect the wages and working conditions of domestic workers similarly employed.

H.R. Rep. No. 682(I) at 50-51 (19861, *reprinted in* 1986 U.S.C.C.A.N. at 5654-55. The Committee also noted that the "essential feature" of the H-2 program was the requirement that efforts be made to find domestic workers before admitting workers from abroad. H.R. Rep. No. 682(I) at 80; U.S.C.C.A.N. at 5684.

Further, in the legislative history of the Immigration Act of 1990, P.L. No. 101-649, 104 Stat. 4978, the House Judiciary Committee expressed its belief that because legitimate employment needs in the U.S. are not being met, immigration should be used to create "the type of workforce needed in an increasingly competitive global economy without adversely impacting on the wages and working conditions of American workers." 723(I) 10lst Cong., at 41 (1990), H.R. Rep. No. *reprinted in* 1990 U.S.C.C.A.N. at 6721. Further, the Committee stated that employers "who have demonstrated that they have attempted, but not located needed workers, should not be penalized for seeking alien workers." H.R. Rep. No. 723 at 139. Thus, the legislative history of recent amendments to the INA shows that Congress intended for the H-2A program to satisfy the needs of employers whose labor needs, cannot be filled by U.S. workers. As was discussed earlier, Mr. Maltsberger maintains a cadre of H-2A workers because he cannot find domestic cattle ranch workers to fill his need. Since the temporary foreign workers he hires are not displacing U.S. workers, their use comports with the purpose of the INA.

Moreover, the job opportunities at the Maltsberger Ranch seem to be fortuitous to the aliens themselves, since Mr. Maltsberger pays and furnishes "H-2A workers more in a single day than major companies from the United States are now paying their employees in Mexico for a full week['ls work." (Photo Journal at 24.) In addition, these workers do not wish to remain in the U.S. on a full-time basis, returning to Mexico and their families on a regular basis for extended periods of time.

Accordingly, the circumstances Mr. Maltsberger faces are extraordinary. Therefore, on the basis of the written record and after due consideration of the submissions from the parties, I find that Mr. Maltsberger's application for temporary agricultural labor certification is for seasonal and temporary labor. Accordingly, the Certifying Officer's denial is REVERSED, and the Certifying Officer shall proceed to process the application in accordance with the regulations.

IT IS SO ORDERED.

DAVID A. CLARKE, JR.
Administrative Law Judge

Washington, D.C.
DAC/cal